United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 10, 2006

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 542-3367-6750
542-6700
SUBJECT: Metropolitan Regional Council of 542-7500
Carpenters (Parkview Builders, Inc.)
Case 4-CB-9538-1

This Section 8(b)(1)(B) case was submitted for advice regarding whether a Union unlawfully fined a Union member who was president and part owner of a unionized Employer. We conclude that the Union did not unlawfully fine the Union member/President, and need not reach the difficult issue of whether the President's substantial ownership interests and managerial responsibilities were such that the President constituted the Employer and the Employer's selection of its representatives could not be coerced where the Employer itself was the representative. Thus, even if the President were not equivalent to the Employer, there is insufficient evidence to show that the Union fined the President for carrying out any Section 8(b)(1)(B) duties for the Employer.

FACTS

Background

Parkview Builders, Inc., ("Parkview" or "the Employer") has been an independent signatory to collective-bargaining agreements with the Metropolitan Regional Council of Carpenters ("the Union") for about ten years. Parkview regularly employs 3-4 Union member carpenters. In the past, Parkview has provided carpentry services exclusively as a subcontractor to Irwin & Leighton ("Irwin"), a large nonunion construction contractor that operates from the same King of Prussia, Pennsylvania address as does Parkview. For about ten years, Irwin has not directly employed carpenters, but has assigned carpentry work to subcontractors such as Parkview. In a Section 8(a)(5) charge filed by the Union against Parkview and Irwin, the Region concluded that Parkview and Irwin were separate employers, and not a single and/or joint employer.[1] While the Union's Section 8(a)(5)

[1] The General Counsel denied the Union's appeal of the Region's dismissal of Parkview Building and Irwin & Leighton, Inc., Case 4-CA-34093.

charge was pending in the Region, Parkview filed the instant 8(b)(1)(B) charge against the Union.

Parkview's ownership and management

From about 1988 to 2001, Parkview's founder, a former Irwin project manager, was the sole owner of Parkview. From about 2001 until about June 2005, another former Irwin project manager was the sole owner of Parkview. That owner served as Parkview's full time president for the first three years of his ownership, from 2001 until July 2004. From about July 2004 until June or July 2005, that owner ceased acting as Parkview's president without appointing a replacement. During that time, Parkview's superintendent, who was a Union member, undertook increased managerial responsibilities, but with no change in title.

In late June or early July 2005, six new owners purchased Parkview. One of those new owners, the same superintendent who in about July 2004 began to assume more substantial managerial responsibilities, purchased 15 percent of the business. He also became Parkview's president, while retaining his Union membership.[2] Four of the five other new owners each purchased 20 percent of the business. None of those 20-percent owners worked for Parkview; one of the 20-percent owners was Irwin's president. Another Parkview employee purchased the remaining 5 percent share; that employee was also a Union member, but was not a company officer.

The current Parkview President worked at Parkview for about 10 years before becoming President. During his first year at Parkview, he was a foreman, and for the next nine years, he was a superintendent. Throughout, as a Union member, he made contributions to the Union's benefit funds. The Parkview President is the sole day-to-day labor relations and managerial representative of the Employer.

The Union Fines the Parkview President

In May 2005, two Union business representatives interviewed the superintendent, who early in June would become Parkview's President, in the Union's office about the circumstances under which he was working at Parkview. In

[2] The Parkview President stated that he had been President since early June 2005, and he identified himself to Union representatives as President on June 21. Although it is unclear exactly when in late June or July he became an owner, it is undisputed that by July 21, when he received an internal Union charge, he was both President and part owner.

particular, they asked who supervised him. He responded that he did not have a supervisor, that he was the job superintendent. In response to another question, he also said that he was not working for cash. The Union representatives also interviewed other Parkview employees, including the son of a former Parkview owner, about the two entities (Parkview and Irwin).

During a June 21 telephone call, the Union's business manager asked the Parkview President what role he had at Parkview. He responded that he was President. The Union's business manager next asked that the Parkview President identify Parkview's owners. At that time, the President refused to do so.[3] In the same phone call, the Union's business manager threatened the President with internal Union charges.

On about July 21, 2005, the Parkview President received a Union internal charge notice, which was dated June 21, the same date as the Union business manager's phone call. In that charge, the Union alleged that the President had violated certain provisions of the Union's constitution and its working rules. Those violations were characterized as "past and continuing violations from June 21, 2005." In particular, the alleged violations included working overtime without approval from the Union; working without a steward absent approval from the Union; supervising nonunion carpenters; assigning Union work to nonunion workers; failing to report job starts; failing to ensure that he worked on a Union project; and obstructing Union officials in their duties and refusing to cooperate with Union officials.[4]

During an October 2005 Union internal hearing, the Parkview President denied committing the above alleged violations. At the hearing, the Union's business representatives produced Irwin documents or publications referring to or identifying the Parkview President as an Irwin representative. The Parkview President denied that he was an Irwin employee. Shortly thereafter, the Parkview President received a notice from the Union that he had been fined $850 for the violations found. The President appealed

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[3] According to the President's written statement submitted at the internal Union hearing, he "promptly" sought his fellow owners' agreement to release the requested information, and "soon thereafter" supplied it.

[4] Some other allegations were later dismissed; those included creating dissension among members, transporting Employer tools in a personal vehicle, and dues violations.

the fine to the Union's International; his appeal is pending.

ACTION

We conclude that the Union did not violate Section 8(b)(1)(B) when it fined the Parkview President. This case raises a difficult issue whether Section 8(b)(1)(B) should even apply because Parkview itself, through its President, arguably is acting as the Section 8(b)(1)(B) representative. If it is, the Union's conduct would not interfere with Parkview's selection of its representative because it could not adversely affect the Employer's performance of Section 8(b)(1)(B) duties;[5] the President would be so identified with Parkview through the combination of his substantial ownership interest with his role as president and sole on-site managerial representative that no violation would be found. However, we need not resolve that issue because assuming that the President were not in effect the same as Parkview, the Union did not violate Section 8(b)(1)(B) when it fined him. In this regard, the available evidence does not establish that the discipline was related to the President's Section 8(b)(1)(B) duties on behalf of Parkview.

Applicable Principles

A union's discipline of a member does not violate Section 8(b)(1)(B) unless that discipline coerces or restrains the employer's "selection of its representatives for collective bargaining or adjustment of grievances." No violation is established unless (1) the employer representative-member is engaged in Section 8(b)(1)(B) activities; (2) the union has a collective-bargaining relationship with the employer or seeks to establish one; and (3) the union's discipline adversely affects the employer's Section 8(b)(1)(B) representative in performing the duties of, and in the capacity of, grievance adjuster or collective bargainer on behalf of the employer.[6]

An adverse effect on future 8(b)(1)(B) activities "exists *only* when an employer representative is disciplined for behavior that occurs *while he or she is engaged in § 8(b)(1)(B) duties* – that is, 'collective bargaining or

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[5] See Glaziers & Glassworkers Local 1621 (Glass Mgmt. Assn.), 221 NLRB 509, 511-12 (1975).

[6] NLRB v. IBEW Local 340 (Royal Electric), 481 U.S. 573, 581-585 (1987); Florida Power & Light Co. v. IBEW Local 641, 417 US 790, 804-805 (1974); IBEW Local 1547 (Veco, Inc.), 300 NLRB 1065 (1990), enf'd 971 F.2d 1435 (9th Cir. 1992).

grievance adjustment, or . . . any activities related thereto.'"[7] The statutory section shelters a narrow range of supervisory activity and was not intended to resolve every conflict of interest that arises when an employer's supervisor retains union membership.[8] As the Supreme Court explained, any conflict of interest that arises is of the employer's own making and could be resolved by requiring a supervisor to resign his or her union membership or by resolving the conflict through collective bargaining.[9] As the Court also explained, it is the employer, not the supervisor-member, who is protected from coercion by the statute.[10]

Accordingly, Section 8(b)(1)(B) does not apply where the union member's ownership interest is such that the union member constitutes the employer in question.[11] To determine whether a union member is the equivalent of the employer, the Board looks to the extent of the member's financial ownership in the company involved. That is so because when the union member has a personal financial stake in the business, "it is difficult to envision circumstances where the employer would be greatly influenced in the performance of his grievance-adjustment or collective-bargaining functions where any decision he makes in those respects directly works to his benefit or detriment depending on how he decides it."[12] To find a Section 8(b)(1)(B) violation where there is substantial ownership by the representative would "resurrect the sweeping conflict of loyalties rationale" that the Supreme Court has limited.[13] In addition, applying Section 8(b)(1)(B) in such circumstances would tend to deprive a union of its economic weapons merely

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[7] IBEW Local 340 (Royal Electric), 481 U.S. at 582 (quoting Florida Power, 417 U.S. at 805) (emphasis in Royal Electric).

[8] See IBEW Local 340 (Royal Electric), 481 U.S. at 583-584; Florida Power, 417 U.S. at 811-813.

[9] IBEW Local 340 (Royal Electric), 481 U.S. at 593 (citing Florida Power, 417 U.S. at 812-813).

[10] IBEW Local 340 (Royal Electric), 481 U.S. at 594.

[11] Glass Mgmt. Assn., 221 NLRB at 511.

[12] Glass Mgmt. Assn., 221 NLRB at 512.

[13] Glass Mgmt. Assn., 221 NLRB at 513 (citing Florida Power, 417 U.S. at 804-805). See IBEW Local 340 (Royal Electric), 481 U.S. at 583-587; Florida Power, 417 U.S. at 811-813.

because the employer chooses to act as its own Section 8(b)(1)(B) representative.[14]

Section 8(b)(1)(B) Would Not Apply If the Parkview President Were the Employer

Applying the above principles here, the President is a Section 8(b)(1)(B) representative based on his role as the sole day-to-day manager at Parkview, whose duties included labor relations.[15] However, the President may have been so identified with Parkview through his ownership interest and his role as President that the Union's conduct could not interfere with Parkview's *selection of its* representative because the Union could not subvert the "loyalty" between the President as the essential employing entity and Parkview.[16]

The Board has found that a supervisor, who is not an employer officer, is an employer when an individual ownership interest of 10 percent combined with family ownership equals the total ownership interest.[17] The Board has also found that a supervisor, who is not an employer officer, is an employer where that individual has a 25 percent ownership interest.[18] However, a union member's mere managerial authority, without ownership interest, does not negate the need for Section 8(b)(1)(B) protection for an employer.[19] The Board has not been presented with a situation where, as here, an officer with virtually total managerial authority and oversight regarding day-to-day affairs (including labor relations) has more than two but less than 25 percent ownership.

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[14] Glass Mgmt. Assn., 221 NLRB at 512-513.

[15] See Elevator Constructors Local 1 (National Elevator Industry), 339 NLRB 977, 977 n.2, 982-983 (2003); Steelworkers Local 1013 (USX Corp.), 301 NLRB 1207, 1209 (1991).

[16] See Glass Mgmt. Assn., 221 NLRB at 511-513.

[17] Id., at 511-513.

[18] Id. On the other hand, an ownership interest of 2 percent, without more, does not remove that individual from Section 8(b)(1)(B). Glass Mgmt. Assn., 221 NLRB at 213.

[19] See Electrical Workers Local 46 (PAC, Inc.), 273 NLRB 1357, 1357 n.1, 1364 (1985) (employer's manager was an 8(b)(1)(B) agent only, and not "the employer," where neither he nor family members possessed any ownership or profit sharing interest).

We recognize that in the circumstances of this case, the Parkview President's ownership stake of 15 percent, when weighed along with the other unique factors present, arguably made the President "for all intents and purposes, the 'employer' within the meaning of Section 8(b)(1)(B)."[20] Thus, the President's ownership interest should be evaluated in acontext where four of the other five owners each own only 5 percent more than the President does, and the fifth owns 10 percent less than the President does and works for the President as his employee. In addition, the President has been involved with the other five owners from the outset of the company's current makeup, and he has been the sole day-to-day manager of this company since at least when he and the other owners purchased it. These factors, together with the small size of the workforce (at most four employees) and the President's long history with Parkview, suggest that the Union's discipline of the Parkview President could not coerce Parkview in its selection of its representative.

Thus, it is arguably unlikely that the Parkview President would "take actions in the performance of the relevant functions which would be detrimental" to his own ownership interest or that of his co-owners.[21] Such discipline further would not have the arguable effect of coercing the President and his five other co-owners from retaining the President as president along with his managerial authority, especially regarding labor relations. In such circumstances, Parkview itself arguably would be acting as the Section 8(b)(1)(B) representative. To apply Section 8(b)(1)(B) if the President has a sufficiently substantial ownership interest, and has been so completely identified with Parkview as its President, also would deprive the Union of its otherwise valid ability to fine a member merely because Parkview effectively acts as its own Section 8(b)(1)(B) representative.[22]

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[20] Glass Mgmt. Assn., 221 NLRB at 511. As noted above, n.2, the President was an owner at least by July 21, when he received the Union's internal charge, and the Employer has alleged that it was on July 21 that the unlawful effort to restrain or coerce Parkview in its selection of its Section 8(b)(1)(B) representative began.

[21] Glass Mgmt. Assn., 221 NLRB at 513.

[22] Id., at 512-513.

However, as noted above, the Board has never considered a case where, as here, the circumstances consist of a company president's 15 percent ownership interest when compared to the few other owners, his participation in the current ownership of the business since its purchase from a prior owner, his current role as president, and his history as sole day-to-day manager of a small workforce's activities. Thus,it is unclear whether it would decide here that the President would not be influenced by the Union discipline to perform his Section 8(b)(1)(B) duties in a manner that would have an adverse effect on Parkview, because the President at least arguably is equivalent to the Employer within the meaning of Section 8(b)(1)(B). However, we need not resolve that issue in light of our conclusion set forth below.

The Union Fine Is Not Related to the President's Section 8(b)(1)(B) Duties for Parkview

Even if the President is not effectively the Employer and Section 8(b)(1)(B) would be applicable to his performance of his duties, the available evidence does not support a conclusion that the Union restrained or coerced Parkview's representative in his Section 8(b)(1)(B) duties when it fined the President. Although the President is Parkview's Section 8(b)(1)(B) representative and Parkview has a collective-bargaining relationship with the Union, the evidence discussed below does not establish a nexus between the fine and any Section 8(b)(1)(B) duties that the President performed for Parkview.

Although it is unclear exactly what conduct constituted the basis for the Union's discipline, the Union fine may have been related in part to the President's initial refusal on June 21, 2005 to provide the Union's requested information about Parkview's ownership, as suggested by the June 21 date on the internal Union charge form. If that were so, the President quickly supplied the requested information, according to the unrebutted statement that he presented at the Union hearing. In any event, any fine for this alleged lack of cooperation with a Union investigation does not implicate contract negotiations or grievance adjustment, which are the concerns of Section 8(b)(1)(B).

The Union may have imposed the fine in part because, based on Irwin publications introduced at the hearing that referred to the Parkview President as an Irwin representative or employee, the Union suspected the Parkview President was serving as an Irwin manager, or as a manager of Irwin's nonunion subcontractors. However, there is insufficient evidence to show a nexus between the fine and

his 8(b)(1)(B) duties for Parkview.[23] Rather, the fine stemmed from alleged conduct that does not involve the President's duties as a Parkview representative, but to conduct that appears to be linked to a suspected Irwin manager's duties. That alleged conduct would be consistent with the Union's position that Parkview and Irwin constitute a single or joint employer.

Thus, the alleged violations of the Union's constitution and working rules included working without a steward while supervising nonunion carpenters, assigning Union work to nonunion workers, and working overtime without Union approval. Parkview, however, has a collective-bargaining relationship with the Union and employs only Union-represented carpenters. And, as the Region has found, Parkview is not a single or joint employer with Irwin. The fact that the Parkview President was serving as Parkview's Section 8(b)(1)(B) representative does not mean that he also was serving as Irwin's Section 8(b)(1)(B) representative.[24] Therefore, the evidence is insufficient to show that the Union's discipline was related to or inextricably linked to the President's Section 8(b)(1)(B) duties for Parkview, and the charge should be dismissed, absent withdrawal.

B.J.K.

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[23] See Teamsters Local 507 (Klein News), 306 NLRB 118, 121 (1992) (no Section 8(b)(1)(B) violation as no nexus between coercion, occurring when union agents followed Section 8(b)(1)(B) representative's car, and performance of covered functions). Cf. Elevator Constructors Local 10 (Thyssen General Elevator Co.), 338 NLRB 701,703 (2002) (violation found where discipline was "inextricably intertwined" with Section 8(b)(1)(B) duties); Teamsters Local 507 (Klein News), 306 NLRB at 120 (violation found where union's threatening conduct toward Section 8(b)(1)(B) representative was "inextricably linked" to the representative's contract interpretation duties).

[24] See IBEW Local 1547 (Redi Electric), 300 NLRB 604, 604, 607 (1990) (no Section 8(b)(1)(B) violation when a union disciplined a member for conduct that related to an employer that was not the employer for whom the member served as a Section 8(b)(1)(B) representative and when the failure of the complaint to allege a joint employer status for the two employers foreclosed establishing a violation based on such a relationship).